BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: ARCHITECTURAL GLASS & ALUMINUM CO., INC. 1911 Union Street Oakland, CA 94607 Employer	Docket No. 01-R1D3-5031 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petitions for reconsideration filed in the above-entitled matter by both Architectural Glass & Aluminum Co., Inc. (Employer), and the Division of Occupational Safety and Health (Division) under submission, makes the following decision after reconsideration.

JURISDICTION

Commencing on July 13, 2001, a representative of the Division conducted an accident investigation at a place of employment maintained by Employer at Pacific Shores Project, Seaport Boulevard, Redwood City, California (the site). On December 10, 2001, the Division issued an amended citation to Employer alleging a serious violation of section[1] 3642(a) [guardrail opening on elevated work platform deck], with a proposed civil penalty of $18,000.

Employer filed a timely appeal contesting the existence and classification of the violation, the characterization of the violation as causing the accident, and the reasonableness of the penalty. Employer also and asserted the independent employee action affirmative defense.

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On February 27, 2003, a hearing was held before Manuel M. Melgoza, Administrative Law Judge (ALJ), in Foster City, California. Ronald E. Medeiros, Attorney, represented Employer. Allyce Kimerling, Staff Counsel, represented the Division.

On March 13, 2003, the ALJ issued a decision granting Employer's appeal as to the serious classification and reclassifying it to general with a proposed civil penalty of $280.

On April 15, 2003, the Division filed a petition for reconsideration and on April 17, 2003, Employer filed a petition for reconsideration. The Division filed an answer to Employer's petition on May 9, 2003 and Employer filed an answer to the Division's petition on May 20, 2003. The Board took both petitions under submission on June 4, 2003.

EVIDENCE

On July 6, 2001, Employer was installing glazing systems (exterior glass and related components) on a four-story building at the site. The employees worked from an electrically-powered mast climbing platform to reach the desired work levels. A section of the guardrail on the building side of the platform had been removed to allow employees access to the work. Preston Towne [Towne], Employer's employee, operated the platform and Jim Poda [Poda], also an employee of Employer, was the only other employee on the platform as it ascended. Poda fell from the platform through the opening created by the missing guardrail. Neither worker was wearing fall protection.

Beginning July 13, 2001, the Division, through its Compliance Officer Brian Brooks [Brooks], conducted an accident investigation at the site. Brooks learned from interviewing Richard Medinas [Medinas], Employer's Safety Manager, and Steve Smith [Smith], the site foreman, that the workers were under instruction to wear harnesses and lifelines (or lanyards) when guardrails were not in place. Brooks conceded on cross-examination that Employer had a strict policy requiring use of fall protection gear when the workers were exposed to a fall due to missing rails. Smith acknowledged that he was in his office at the site when the accident occurred and that he knew the platform was being used with the rail missing. Medinas attempted to explain why it became necessary to remove the platform's railing in order to perform the work which would have required employees to wear personal fall protection pursuant to Employer's safety program. The Division objected and the ALJ disallowed further questioning by Employer on this topic.

ISSUES

1. Did the Division prove that the violation of section 6342(a) was properly classified as serious?
2. Was Employer's Independent Employee Act Defense properly disallowed?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

1. The Division Failed to Prove that the Violation Was Properly Classified as Serious.

The Division issued a citation alleging that a serious violation of section 3642(a) caused an accident wherein "An employee, Jim Poda, was seriously injured when he fell through an opening in the guardrail of an elevated platform of a tower-climbing scaffold. The fall distance was about 20 feet." Section 3642(a) provides:

> (a) The platform deck shall be equipped with:
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> A guardrail or other structure around its upper periphery that shall be 42 inches high, plus or minus 3 inches, with a midrail. (Chains or the equivalent may be substituted where they give equivalent protection.) Where the guardrail is less than 39 inches high, an approved personal fall protection system as defined in Section 3207 of these Orders shall be used in accordance with the requirements of Section 3648(o) of this Article.
> NOTE: Equipment buckets, tubs, or pin—on platforms refer to Section 3647.

In its petition for reconsideration, the Division contends that the ALJ improperly reduced the classification of the citation to general with a resultant penalty reduction to $280. The Division claims that Employer "stipulated at the beginning of the hearing that Mr. Poda's injuries constituted a serious injury for purposes of a serious violation under Labor Code § 6432(a)."[2]

The Division's burden is to prove each element of a violation, and the applicability of the safety order, by a preponderance of the evidence.[3] For a serious violation, the Division must prove that there was a substantial probability that the violation could result in serious physical harm or death.[4] "Substantial probability" refers not to the probability that an accident or

[2] The Board notes that upon review of the stipulation in the tape recording of the hearing, Employer's counsel merely stated "Employer stipulates there was a serious injury."
[3] See *Howard J. White, Inc.,* Cal/OSHA App 78-741, DAR (Jun. 16, 1983); and *Cambro Manufacturing Co.,* Cal/OSHA App. 84-923, DAR Dec.31, 1986). "DAR" in this Decision After Reconsideration refers to Appeals Board Decisions After Reconsideration.
[4] Labor Code Section 6432(a).

exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.[5] The evidence must, at a minimum, show the types of injuries that would more likely than not result from the violative condition.[6] A serious violation shall not be deemed to exist, however, if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.[7]

Brooks testified that the violation was classified as serious because, among other things, there was a substantial probability of serious physical harm or death occurring as a result of a fall from 25 feet.

In its petition, the Division argues that "…Mr. Brooks' testimony that it was more likely than not that death or serious injury would be sustained went unchallenged by any objection to lack of foundation, cross-examination, or request for voir dire … no one could seriously contend that a fall of 25 feet would likely result in an injury of a lesser nature." The fact that Brooks' testimony went unchallenged by Employer is of no significance because the burden is the Division's to show by a preponderance of the evidence each *element* of the violation and *substantial probability* is an element of a serious violation. It may very well be that a fall to the ground of 25 feet could more likely than not result in serious injury, however, no other evidence was offered that could lead the Board to that conclusion and the Board has no evidence as to the actual conditions at the time of the violation. To find, as the Division suggests, that no one could seriously contend that a fall to the ground of 25 feet would not result in serious injury would be tantamount to taking official notice[8] of an element of the violation for which the Division bears the burden.[9]

The Board will not take official notice while a case in under reconsideration without affording the opposing party a reasonable opportunity to respond. The Division did not ask the Board to take official notice in this case and the Board declines to do so *sua sponte* since insufficient evidence has been presented in this case for the Board to act. The Board believes that if it unilaterally seeks out supporting evidence to uphold the Division's conclusionary assertions it would be placing itself in the role as advocate, a role it is unwilling to take. As noted in *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*,[10] the Board is an independent adjudicatory agency statutorily created for the purpose to resolve appeals from citations. The

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[5] *Id* section 6432(b).
[6] *Capital Building Maintenance Services, Inc.,* Cal/OSHA App. 97-680, DAR (Aug. 20, 2001), relying on *Findly Chemical Disposal, Inc.,* Cal/OSHA App. 91-431, DAR (May 7. 1992).
[7] Labor Code Section 6432(c).
[8] Employer, in its answer to the Division's petition, contends that the Division now proposes the Board adopt a ***presumption*** that accidents involving falls from 25 feet would always result in serious injuries.
[9] See *Western Pipeline*, Cal/OSHA App. 80-1426, DAR (Sep.28, 1981).
[10] Cal/OSHA App. 98-311, DAR (Apr. 25, 2001) citing *Rick's Electric, Inc.* v. *California Occupational Safety and Health Appeals Board* (2000) 80 Cal.App.4th 1023.

Division, on the other hand, shoulders primary responsibility for issuing and prosecuting citations issued to enforce the California Occupational Safety and Health Act of 1973.[11]

Since the burden is on the Division to prove that there was a substantial probability of serious physical harm resulting from the violative condition assuming an accident occurs as a result of the violation and that burden is not met by a mere recitation of the requirements of what constitutes a serious violation, the Board cannot, without more, make a finding that a serious violation existed at the time that the guardrail was removed.[12]

2. Employer's Independent Employee Act Defense Was Properly Disallowed.

In its petition for reconsideration, Employer contends that its safety policy of requiring employees to wear harnesses and lifelines (or lanyards) when guardrail sections of the mast climbing platform are not in place, would have been consistent with the requirements of section 3642(a), if strictly followed by Poda. It argues that the ALJ erred in sustaining the Division's relevance objection and not permitting it to offer evidence that Poda's failure to use fall protection was the result of his own independent employee misconduct and not that of Employer.

Section 3642(a) requires that guardrails shall be provided on elevating work platform equipment around the upper periphery of such equipment. Employer acknowledged it did not have railings around the entire periphery of the equipment its employees were using. The Board finds, therefore, that a violation of section 3642(a) was established. The independent employee action defense that Employer attempted to show is unavailable where the cited safety order requires positive guarding.[13]

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[11] See *C.C. Myers, Inc.,* Cal/OSHA App. 00-008, DAR (Apr.13, 2001).

[12] Cases cited by the Division in its petition are distinguishable from the instant case. In *Dennis J. Amoroso Construction Co., Inc.,* Cal/OSHA App. 98-4256, DAR (Dec. 20, 2001) "substantial probability" was supported by evidence of the types of injuries that could occur; in *Contra Costa Electric, Inc.,* Cal/OSHA App. 90-470, DAR (May 8, 1991) there was testimony based upon past history of such accidents to support "substantial probability;" in both *General Floors, Inc.,* Cal/OSHA App. 78-1362, DAR (Feb. 19, 1985) and *Yancey Roofing Corp.,* Cal/OSHA App. 80-1218, DAR (Feb. 27, 1985) the Board found that there was "ample evidence" to support a finding of "substantial probability." In the latter two cases, decided in 1985, there is not a sufficient analysis to make a determination as to the evidence upon which the Board based its finding of "substantial probability." In the instant case there was *no evidence* presented by the Division to address the "substantial probability" requirement for classifying the violation as serious.

[13] See *Pierce Enterprises,* Cal/OSHA App. 00-1951, DAR (Mar. 20, 2002); *Heritage Railway Service, Inc.,* Cal/OSHA App. 98-1088, DAR (Apr. 10, 2002).

A general violation of section 3642(a) is established and a civil penalty of $280 is assessed.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 22, 2004